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ABSTRACT

The author picks two areas in which there has been recent litigation--decisions affecting freedom of speech and court decisions interpreting the Establishment of Religion and the Free Exercise Clauses of the First Amendment. In the freedom of speech area, the author examines the effect of recent court decisions on underground student newspapers. He concludes that the discernible trend of court decisions on underground newspapers is toward increased student rights and responsibility. In both areas, the author points out apparent conflicts among court decisions and explains how these decisions might be interpreted to resolve the conflicts. (JF)

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INCONSISTENCIES IN FEDERAL COURT DECISIONS AFFECTING EDUCATION.

BY RON APPERSON

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[illegible] GENTLEMEN:

[illegible] WAS DESCRIBING TO HER FATHER HOW HER SCHOOL DAY BEGAN. SHE SAID, "FIRST YOU HAVE TO BE IN YOUR SEAT WHEN THE BELL RINGS; THEN WE ALL MUST BE VERY QUIET; THEN WE GIVE THE PLEDGE TO THE FLAG; THEN WE SING AMERICA, AND THEN OUR PRINCIPAL GIVES THE COMMERCIAL."

A SCHOOL ATTORNEY DELIVERS MANY COMMERCIALS. HE PITCHES TO DIVERSE AUDIENCES WITH A VARIETY OF PROBLEMS.

THIS MORNING I APPRECIATE AND WELCOME THE INVITATION TO SHARE WITH YOU SOME MUTUAL ADMINISTRATIVE CONCERNS--AND POSSIBLY INJECT A FEW COMMERCIALS. IN MY OWN EXPERIENCE, AND PROBABLY IN COMMON WITH THAT OF OTHER SCHOOL ATTORNEYS, I AM AT TIMES CONFRONTED WITH SITUATIONS WHICH RUN HEAD-ON INTO SOME CONTRARY JUDICIAL DECISIONS. I AM VERY MUCH AWARE THAT THE RESTRAINTS UPON MY LEGAL ROLE MAY REQUIRE ADVICE OR COUNSEL WHICH IS CONTRARY TO MY OWN PHILOSOPHY--OR CONTRARY TO THE POINT OF VIEW OF THE ADMINISTRATOR SEEKING LEGAL ASSISTANCE.

HOW DOES THE LEGAL ADVISER HANDLE HIS ROLE UNDER SUCH CIRCUMSTANCES? FRANKLY, I ANALYZE THE FACTS PRESENTED, TRY TO REACH A LOGICAL CONCLUSION, TAKE A DEEP BREATH, AND UNDERTAKE THE PRECARIOUS FUNCTION OF PERSUADER. MY PRIMARY OBJECTIVE IS TO SEEK THOSE SOLUTIONS WHICH ENABLE BOARD MEMBERS, SUPERINTENDENT, OR OTHER DISTRICT ADMINISTRATORS TO OPERATE EFFECTIVELY WITHIN LEGAL CONSTRAINTS, WHATEVER THEY MAY BE.

[illegible] AS SHARP AND SPECIAL. IT IS SOMETIMES AN ARTFUL BUSINESS, BUT I TRY NOT TO BECOME ENTANGLED IN THE TWISTS AND TURNS OF LANGUAGE. MY ADMONITION TO STAFF IS: "SAY

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IT OR WRITE IT SO THAT A SEVENTH GRADER WILL UNDERSTAND."

ALTHOUGH THIS SIMPLISTIC APPROACH IS OFTEN DEFEATED BY CIRCUMSTANCES--IT SERVES A GENUINE CONSTRUCTIVE PURPOSE. IT REQUIRES THE INTERPRETATION THAT WAS INTENDED.

EACH OF US HAS BEEN WITNESS TO CHANGING SOCIETAL VALUES. THESE CHANGES ARE REFLECTED IN THE CHALLENGES TO JUDICIAL INTERPRETATIONS. TODAY, MORE THAN EVER, IT IS READILY APPARENT THAT BOTH ADMINISTRATOR AND SCHOOL ATTORNEY MUST BE "WITH IT". WE MUST SWING WITH THE SUBTLETIES AND NUANCES OF CHANGE--OR BE HANGED BY THEM. EMERSON SAID: "WITH CONSISTENCY A GREAT SOUL HAS SIMPLY NOTHING TO DO . . . SPEAK WHAT YOU THINK TODAY IN WORDS AS HARD AS CANNON BALLS, AND TOMORROW SPEAK WHAT TOMORROW THINKS IN HARD WORDS AGAIN, THOUGH IT CONTRADICT EVERYTHING YOU SAID TODAY."[1]

OUR WATCHWORDS APPEAR TO BE PERCEPTION, UNDERSTANDING, TOLERANCE, AND FLEXIBILITY.

MY EXPERIENCES IN LOS ANGELES INDICATE THAT THE LOUDEST AND SHARPEST RUMBLINGS ARISE IN AREAS AFFECTING INDIVIDUAL RIGHTS. PARENTS, STUDENTS, COMMUNITY MEMBERS, ADVISORY COMMITTEES, EMPLOYEE ORGANIZATIONS--ALL STRIDENTLY EXPRESS CONCERNS OVER NEWER RULES, POLICIES, GUIDELINES, OR WHATEVER BAR OR DELIMIT A DESIRED ACTIVITY. THIS BARRIER OR LIMITATION, WHENEVER IT APPEARS, IS FREQUENTLY REGARDED MORE AS AN ASPECT OF AUTHORITARIANISM RATHER THAN A REASONED ATTENTION TO THE GENERAL GOOD. "NO" IN ANY FORM IS UNPALATABLE; DIRECTLY IT IS AN IRRITANT. TODAY'S INSISTENCE UPON LAISSEZ-FAIRE, THIS PROJECTION OF SELF-INTEREST IS DEMANDING INCREASED ADMINISTRATIVE TIME, ATTENTION, AND EFFORT. TO SOME IT MAY APPEAR, AT TIMES, AS A CONTINUING SOURCE OF HARASSMENT; TO OTHERS, AN ANNOYING, OFTEN PERPLEXING, DISTRACTION FROM THE MAIN BUSINESS OF EDUCATION. HOWEVER, I THINK WE MUST VIEW IT AS A RELEVANT AND LEGITIMATE INQUIRY AND BE PREPARED TO PATIENTLY AND CONSISTENTLY DEAL WITH CONCERNS AND QUERIES EVEN IF SOMETIMES IRRESPONSIBLE. DR. RILES TALKS OF OUR SCHOOLS OF TOMORROW AS BEING PLACES OF EDUCATION AND NOT TRAINING. IF WE CANNOT PATIENTLY AND CONSISTENTLY AND SOMEWHAT PERSUASIVELY EXPLAIN WHAT WE ARE ABOUT, WE OUGHT NOT BE ABOUT IT.

PARTICULARLY BY OUR HIGH SCHOOL STUDENTS EXPRESS OVERRIDING CONCERNS WITH INDIVIDUAL RIGHTS--CONSTITUTIONAL RIGHTS--FIRST AMENDMENT RIGHTS.

IS THERE ANY ONE AMONG US WHO HASN'T DIRECTLY OR INDIRECTLY FELT THE STING OF AN UNDERGROUND PRESS? AT TIMES IT HAS THE IMPACT OF "A CIRCULATING LIBRARY WITH HIGH BLOOD PRESSURE". THIS JOURNALISTIC OUTLET FOR YOUTHFUL SPIRITS, VENOM, and DISCONTENT HAS TICKLED THE JUVENILE FANCY--NATIONWIDE. ADMINISTRATIVE REACTION HAS BEEN LESS THAN JUBILANT. YET THE COURTS SEEM TO SUGGEST THAT SO-CALLED UNDERGROUND NEWSPAPERS FALL WITHIN THE PROTECTIVE AMBIT OF THE FIRST AMENDMENT. LEST THERE BE ANY MISUNDERSTANDING, BY HIGH SCHOOL UNDERGROUND NEWSPAPERS we REFER TO PERIODICALS--OFTEN IRREGULAR--WRITTEN AND PUBLISHED BY STUDENTS AT THEIR OWN EXPENSE AND OFF SCHOOL PREMISES, AND NOT OFFICIALLY SANCTIONED BY SCHOOL AUTHORITIES.[2] WHETHER THEY REPRESENT GENUINE DISAFFECTION FOR THE SCHOOL, A LEGITIMATE STUDENT DESIRE TO WRITE AND PUBLISH WITHOUT EXTERNAL RESTRAINTS, A REACTION TO PARENTAL URGING AND POLITICAL PERSUASION, OR A FORM OF REBELLION AGAINST THE ESTABLISHMENT--WHATEVER THEIR PURPOSE OR ORIGIN--THEY DOT THE NATIONAL SCHOLASTIC LANDSCAPE LIKE DISCARDED LUNCH WRAPPINGS.

DO THESE UNDERGROUND PUBLICATIONS HAVE FREEDOM OF EXPRESSION PROTECTION? ARE THEIR WRITERS AND PUBLISHERS SHIELDED BY THE FIRST AMENDMENT UMBRELLA? THE COURTS SAY "YES"--AND "NO". IN EACH CASE THEY LOOK TO THE FACTS.

FORTY-NINE YEARS AGO THE SUPREME COURT APPLIED THE FIRST AMENDMENT TO THE STATES.[3] AS A RESULT, ADMINISTRATORS AND TEACHERS--ARMS OF THE STATE[4]--ARE NO MORE ALLOWED TO RESTRICT FIRST AMENDMENT RIGHTS THAN ARE OTHER GOVERNMENT OFFICIALS. SO EVEN THOUGH PARENTS AND OTHER COMMUNITY MEMBERS MAY PRESSURE ADMINISTRATORS TO ACT AGAINST CERTAIN UNPOPULAR EXPRESSIONS OF OPINIONS BY STUDENTS, THE SCHOOL LEADERS ARE RESPONSIBLE TO THE SCHOOL BOARD--ALSO GOVERNMENT OFFICIALS--AND NOT TO VOICES ASKING FOR FIRST AMENDMENT RESTRICTIONS.[5]

BOTH CASES HOLD OUT NON-INTERFERENCE AS THE SCHOOL MOTTO; OTHERS HAVE HELD THAT COURTS MUST ENTER THE CLASSROOM TO PROTECT CONSTITUTIONAL RIGHTS. ON THE ONE HAND, SCHOOL OFFICIALS HAVE BROAD DISCRETION IN RUNNING THE SCHOOLS, IN REGULATING

STUDENT LIFE, IN APPLYING CORPORAL PUNISHMENT. ON THE OTHER HAND, SCHOOLS ARE NOT EXEMPT FROM JUDICIAL SCRUTINY WHEN PERSONAL FREEDOMS MAY BE AT ISSUE OR WHEN RULES CONSTITUTE AN UNREASONABLE USE OF THE ADMINISTRATOR'S POWER AND DISCRETION TO MAINTAIN ORDER.

THE LANDMARK CASE FOR HIGH SCHOOL STUDENTS' RIGHTS, TINKER V. DES MOINES SCHOOL DISTRICT,[6] WAS DECIDED IN 1969. IN SUBSTANCE, TINKER HELD THAT STUDENTS ARE ENTITLED TO FREEDOM OF EXPRESSION OF THEIR VIEWS UNLESS ADMINISTRATORS SHOW CONSTITUTIONALLY VALID REASONS TO THE CONTRARY. THIS PRINCIPLE IS SIGNIFICANT TO UNDERGROUND NEWSPAPERS IN THAT IT IS NOT LIMITED TO CLASSROOM DISCUSSION AND ACTIVITIES, BUT EXTENDS BEYOND SUPERVISED INSTRUCTIONAL TIME.[7]

ALTHOUGH ADHERENCE TO OR DIGRESSION FROM PRECEDENT BY THE JUDICIARY HOLDS A PARTICULAR FASCINATION FOR THE LAWYER, I WOULD POINT OUT ONLY A FEW PRINCIPLES WHICH ARE APPLICABLE:

1. REASONABLE RULES AND REGULATIONS ARE THOSE ESSENTIAL FOR MAINTAINING ORDER AND DISCIPLINE ON SCHOOL GROUNDS.

2. WHEN LOCAL RULES INFRINGE UPON FREEDOM OF EXPRESSION, ADMINISTRATORS HAVE THE BURDEN OF JUSTIFYING SUCH RULES.

3. ADMINISTRATORS MUST SHOW MORE THAN A MERE DESIRE TO AVOID THE DISCOMFORT AND UNPLEASANTNESS THAT ACCOMPANY AN UNPOPULAR VIEWPOINT.

4. ADMINISTRATORS MAY PLACE REASONABLE RESTRICTIONS ON THE TIME, PLACE, MANNER, AND DURATION OF EXPRESSIONS OF OPINION.

5. [illegible] SCHOOL OPERATIONS OR THE RIGHTS OF OTHER STUDENTS WILL NOT BE PROTECTED. [illegible]

CLOSELY FOLLOWING THE TINKER AND AN EARLIER BURNSIDE[8] DECISION, THE 7TH CIRCUIT IN 1969 ENUNCIATED A "FORECAST OF DISRUPTIVE EVENTS" STANDARD.[9] IT OVERTURNED A REFUSAL BY THE DISTRICT COURT TO READMIT TWO HIGH SCHOOL STUDENTS WHO HAD BEEN SUSPENDED FOR THE PUBLICATION OF AN UNDERGROUND PAPER THAT ENCOURAGED OTHERS TO DISREGARD SCHOOL RULES. THE DISTRICT COURT HELD THAT SUCH WRITING WAS DIRECTED TO AN IMMATURE AUDIENCE WHOSE REACTION COULD ADVERSELY AFFECT THE SCHOOL. THE CIRCUIT COURT RULED THAT CLEAR EVIDENCE FORECASTING A DISTURBANCE WOULD HAVE TO EXIST BEFORE REPRESSING STUDENTS' RIGHTS TO FREE EXPRESSION.[10] EVEN WITH PRECISE RULES, ADMINISTRATORS WOULD HAVE TO PROVE CONCURRENT DISRUPTION BEFORE DISCIPLINARY ACTION COULD BE TAKEN.

IN THE 5TH CIRCUIT, HOWEVER, ALSO CITING TINKER AND BURNSIDE, THE COURT DIRECTED THE READMISSION OF TWO STUDENTS SUSPENDED FOR DISTRIBUTING UNDERGROUND NEWSPAPERS ON SCHOOL CAMPUS. HERE THE DISRUPTIONS WERE TERMED MINIMAL AND NOT SERIOUS ENOUGH TO WARRANT DENYING THE STUDENTS' FIRST AMENDMENT RIGHTS. LACKING NARROWLY DRAWN REGULATIONS, SCHOOL OFFICIALS COULD NOT SERIOUSLY DISCIPLINE STUDENTS INVOLVED IN THE WRITING OR DISTRIBUTION OF NEWSPAPERS ON OR OFF THE CAMPUS UNLESS SUCH ACTIONS SUBSTANTIALLY DISRUPTED SCHOOL OPERATIONS.[11]

IN A 1969 CASE DECIDED BY THE 6TH CIRCUIT, COLLEGE STUDENTS DISTRIBUTED LITERATURE WHICH CALLED THE UNIVERSITY ADMINISTRATORS "DESPOTS" AND "PROBLEM CHILDREN". THE COURT RULED THAT THE LITERATURE WAS CALCULATED TO CAUSE DISTURBANCE AND DISRUPTION OF SCHOOL ACTIVITIES, THAT THE PRESIDENT AND DEAN PROPERLY PREDICTED POSSIBLE DISTURBANCE, AND PROPERLY SUSPENDED THE STUDENTS INVOLVED TO PREVENT THREATENED DISORDERS.[12]

IN 1970, THE LOS ANGELES CITY SCHOOLS SUSPENDED STUDENTS WHO, FROM A POSITION ACROSS THE STREET FROM THE SCHOOL GROUNDS, PASSED OUT FLYERS OPPOSING THE SCHOOL DRESS CODE AND ASKING FOR A STUDENT BOYCOTT OF THE SCHOOL'S CHOCOLATE DRIVE, A FUND-RAISING ACTIVITY. IN THIS CASE[13] THE COURT RAISED A NEW ISSUE; HOW SIGNIFICANT

IS THE ISSUE ABOUT WHICH STUDENTS ARE EXPRESSING OPINIONS? IN CONSIDERING ACTION AGAINST A SCHOOL BY STUDENTS WHO CLAIMED EXPRESSION OF THE FREEDOM OF EXPRESSION, THE COURT STATED:

> " . . . IT IS LIKEWISE THE DUTY OF THE COURT IN EACH CASE TO ASK WHETHER THAT WHICH THE STUDENT WISHES TO SAY IS OF SUCH IMPORTANCE AS WOULD JUSTIFY THE COURT IN INTERFERING WITH THE SCHOOL AUTHORITIES ATTEMPT TO REGULATE WHERE, WHEN, AND HOW HE SHALL SAY IT."[15]

IN THE 5TH CIRCUIT DECISION MENTIONED EARLIER,[16] THE COURT DECIDED THAT SCHOOL OFFICIALS SHOULD HAVE NO CONTROL OVER OFF-CAMPUS STUDENT CONDUCT EXCEPT WHEN SUCH ACTIVITIES MIGHT HAVE SUCH A LASTING EFFECT ON OTHER STUDENTS THAT DISRUPTION COULD RESULT DURING THE NEXT SCHOOL DAY. YET ANOTHER 9TH CIRCUIT CALIFORNIA RULING ON STUDENT DISTRIBUTION OF SCHOOL NEWSPAPERS THAT SAME YEAR HELD THAT DISTRIBUTION ON OR OFF SCHOOL GROUNDS WAS NOT AN ISSUE IN THE CASE AND THAT "SCHOOL AUTHORITIES ARE RESPONSIBLE FOR THE MORALS OF THE STUDENTS WHILE GOING TO AND FROM SCHOOLS, AS WELL AS DURING THE TIME THEY ARE ON CAMPUS".[17]

WE SEE THAT COURT DECISIONS DIFFER ON WHETHER SCHOOL OFFICIALS SHOULD BE FORCED TO ALLOW STUDENT EXPRESSION OF OPINION THROUGH UNDERGROUND NEWSPAPERS. IS IT IN THE BEST INTEREST OF ADMINISTRATORS TO ENCOURAGE DIFFERING VOICES? DOES THE HEALTH OF THE NATION REQUIRE AN "INTERCHANGE OF IDEAS",[18] "FREE POLITICAL DISCUSSION",[19] A "MULTITUDE OF TONGUES",[20] VIGOROUS ADVOCACY OF ISSUES?[21] IF COMPETING VIEWS IN COMPETING MEDIA IS A FUNDAMENTAL AMERICAN CONCEPT, SHOULD NOT THAT CONCEPT BE IN FORCE ON THE SCHOOL CAMPUS? PERHAPS SUCH DECISIONS ROUSE AGREEMENT WITH THE STATEMENT OF SIR JAMES M. BARRIE: "THE PRINTING PRESS IS [illegible] BLESSING OF THE DEMOCRATIC CLASS OF MODERN TIMES, AND DESPOTICS DOUBTS WHICH."[22]

THIS DOES NOT PERMIT PURSUIT OF THE ISSUE OF PRIOR RESTRAINTS, A FORM OF CENSORSHIP.

CAN REQUIRE HEAVY BURDENS OF JUSTIFICATION. OTHERWISE THEY VIOLATE THE FIRST AMENDMENT GUARANTEE OF FREE EXPRESSION. I CAN'T RESIST SQUEEZING IN A COMMENT BY GEORGE BERNARD SHAW ON THE SUBJECT OF CENSORSHIP. HE OBSERVED: "ALL CENSORSHIPS EXIST TO PREVENT ANYONE FROM CHALLENGING CURRENT CONCEPTIONS AND EXISTING INSTITUTIONS. ALL PROGRESS IS INITIATED BY CHALLENGING CURRENT CONCEPTIONS, AND EXECUTED BY SUPPLANTING EXISTING INSTITUTIONS. CONSEQUENTLY, THE FIRST CONDITION OF PROGRESS IS THE REMOVAL OF CENSORSHIPS."[23]

MY CONCLUSION IS THAT THE DISCERNIBLE TREND OF COURT DECISONS ON UNDERGROUND NEWSPAPERS IS TOWARD INCREASED STUDENT RIGHTS AND INCREASED STUDENT RESPONSIBILITY.

1. Emerson, Ralph Waldo, Essays: Self-Reliance in Hoyt's New Cyclopedia of Practical Quotations, Funk & Wagnalls Co., New York, 1927, p. 132

2. Mahmod, Sheldon, 51 Chicago Bar Record 144, 152 (1969)

3. Gitlow v. People of the State of New York, 268 U.S. 652 (1925)

4. Tinker v. Des. Moines School District, 393 U.S. 503, 509 (1969); Westley v. Rossi, 305 F.Supp. 706 (D.Minn. 1969)

5. Trager, Robert, 20 University of Kansas Law Review 239, 240 (1971-2)

6. 393 U.S. 503

7. 393 U.S. 503, 512-13: The Court said: "The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. . . A student's rights, therefore do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."

8. Burnside v. Byars, 363 F.2d 744 (1966)

9. Scoville v. Joliet Township High School District, 425 F.2d 10 (1970)

10. 425 F.2d 10, 13-14

11. Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (S.D. Texas 1969)

12. Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195, 196 (1969), cert. denied 399 U.S. 906 (1970)

13. 419 F.2d 195

14. Hatter v. Los Angeles City High School District, 310 F.Supp. 1309 (C.D. Cal. 1970)

15. 310 F.Supp. 1309, 1340-41

16. [illegible]

17. Baker v. Downey City Board of Education, 307 F.Supp. 517, 526 (C.D. Cal. 1969)

18. Pope v. United States, 354 U.S. 476, 484 (1957)

19. Stromberg v. California, 283 U.S. 359, 369; Bridges v. California, 314 U.S. 252 (1941)

20. New York Times v. Sullivan, 376 U.S. 254 (1964)

21. NAACP v. Button, 371 U.S. 415, 429 (1963)

22. Barrie, Sir James M., Sentimental Tommy, in F.P.A.'s Book of Quotations Funk & Wagnalls Co., New York, 1952, p. 651

23. Shaw, George Bernard quoted in Bennet Cerf, Laugh Day, Doubleday & Co., Inc., Garden City, N.Y., 1955, p. 281

RELIGION

ANOTHER FIRST AMENDMENT RIGHT CAPTURES ATTENTION FROM TIME TO TIME. IN SCHOOLS IT GENERALLY TAKES THE FORM OF PARENTAL OBJECTION TO A HOLIDAY PROGRAM--SUCH AS CHRISTMAS, WHERE SCENES, SYMBOLS, OR SONGS ARE REGARDED BY SOME AS A FORM OF RELIGIOUS INDOCTRINATION. SIMILAR COMPLAINTS ARE ADDRESSED TO HOLIDAY MUSIC PROGRAMS WHICH ARE LABELED SECTARIAN. WE ARE WELL AWARE THAT LITERATURE, ART, AND SOCIETAL EVENTS MAY HAVE A RELIGIOUS ORIGIN. DOES THAT MAKE THEM TABOO IN PUBLIC SCHOOLS? HOW DO WE RESOLVE THESE OBJECTIONS AND MAINTAIN SOLID RELATIONSHIPS WITH OUR TAX-PAYING CLIENTS.

SOME DECISIONS OFFER HELPFUL PRINCIPLES; OTHERS PROVOKE UNCERTAINTY. RELIGION IS A SUBTLE ISSUE. THE COURT HAS TREATED IT WITH SENSITIVITY. ESSENTIALLY, IT HAS ADOPTED AN "ACCOMMODATION" THEORY. IT HAS BREACHED THE WALL WHICH SEPARATED CHURCH AND STATE, FOUND THAT GOVERNMENT COULD ACCOMMODATE THE PEOPLE'S RELIGIOUS AND SPIRITUAL NATURE, AND REMAINED EFFECTIVELY NEUTRAL.

JUDICIAL INTERPRETATIONS OF CHALLENGES TO THE CONSTITUTIONALITY OF A LAW OR PROGRAM REVOLVE AROUND THE MEANINGS OF THOSE TWO FAMILIAR FIRST AMENDMENT CLAUSES: THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE. ~~YOU KNOW, BECAUSE THE PUBLIC WORDING~~ "CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF."

LET US BRIEFLY REVIEW SOME OF THE DECISIONS WHICH HAVE CONTRIBUTED IN PART TO CONFUSION AND IN PART TO THE MODERN POINT OF VIEW.

ON THE SAME DAY IN 1971, THE SUPREME COURT SEEMINGLY ~~[illegible]~~ ARRIVED AT WHAT APPEAR TO BE DIAMETRICALLY OPPOSITE CONCLUSIONS. ON THE ONE HAND IN PENNSYLVANIA[1] AND RHODE ISLAND,[2] THE COURT HELD AS UNCONSTITUTIONAL THE PAYMENT BY THE TWO STATES TO PAROCHIAL SCHOOLS AND TEACHERS, RESPECTIVELY, OF

MONIES TO SUPPORT THE TEACHING OF SECULAR SUBJECTS.[3] THE ESTABLISHMENT CLAUSE WAS VIOLATED BECAUSE THE PAYMENTS PROVIDED AID TO PAROCHIAL SCHOOLS WHICH WERE AN INTEGRAL PART OF THE MISSION OF THE CHURCH.[4]

ON THE OTHER HAND, THE COURT UPHELD CONSTRUCTION GRANT PAYMENTS--UNDER THE HIGHER EDUCATION FACILITIES ACT OF 1963[5]--TO FOUR COLLEGES[6] IN CONNECTICUT WITH RELIGIOUS AFFILIATIONS. THE ACT WAS FOUND TO HAVE NEITHER THE PURPOSE NOR THE EFFECT OF ADVANCING RELIGION.[7]

PERHAPS IT IS INSTANCES SUCH AS THESE WHICH PROMPTED GEORGE HERBERT TO WRITE IN THE EARLY 17TH CENTURY: "THE LAW IS NOT THE SAME AT MORNING AND AT NIGHT."[8]

IN THE PAROCHIAL SCHOOLS CASE, DIRECT SUBSIDIES WERE HELD TO VIOLATE THE ESTABLISHMENT CLAUSE WHETHER THE MONEY WENT DIRECTLY TO THE TEACHERS THEMSELVES OR WAS PAID TO THE SCHOOL. THE COURT FOUND THAT RELIGIOUS INDOCTRINATION WAS NOT A SIGNIFICANT PURPOSE OF THE CONNECTICUT COLLEGES. AID WAS VIEWED AS "ONE-TIME, SINGLE PURPOSE".[9] IN THE COLLEGE INSTANCE AID PRODUCED ONLY A RIPPLE; FOR THE PAROCHIAL SCHOOLS IT GENERATED A WAVE. JUSTICE DOUGLAS IN HIS DISSENT OBSERVED THAT THE RELIGIOUS AND SECULAR ARE NOT SEPARABLE IN SECTARIAN SCHOOLS. AID TO SECTARIAN SCHOOLS INDIRECTLY ADVANCES RELIGION IN THESE SCHOOLS.[10] THOUGH NOT STATED TO IDENTIFY THE INCONSISTENCIES IN THESE TWO DECISIONS, THE NLRB GENERAL COUNSEL MADE A POINT WITH THE FOLLOWING VERSE WHEN ADDRESSING A LAW STUDENT GROUP:

"MEN NEVER KNOW EXACTLY WHAT IS RIGHT;
SO, CAUGHT BETWEEN A PROMISE AND A DOUBT,
THEY FIRST MAKE WINDOWS TO LET IN THE LIGHT,
AND THEN MAKE CURTAINS TO SHUT IT OUT."[11]

~~ON THE SUBJECT~~: "A GROUP OF SCHOOL CHILDREN WERE KNEELING ON THE FLOOR JUST BEFORE CLASS WAS TO BEGIN. THE TEACHER WALKED IN, AND DEEPLY CONCERNED ASKED, 'WHAT ARE YOU CHILDREN DOING KNEELING ON THE FLOOR?' REPLIED ONE OF THE YOUNGSTERS, 'WE'RE PLAYING MARBLES.' 'OH, THAT'S JUST DANDY,' SAID THE TEACHER, RELIEVED, 'I WAS AFRAID YOU WERE PRAYING!'"[12] WHETHER IT WAS A FORM OF GRACE BEFORE SNACK TIME FOR KINDERGARTNERS,[13] OPENING EXERCISES INVOLVING THE READING OF BIBLE VERSES,[14] UNISON RECITATION OF THE LORD'S PRAYER,[15] EACH WAS HELD TO FALL WITHIN THE ARMIT OF THE BAR AGAINST RELIGIOUS ACTIVITY. JUSTICE BRENNAN, A PRACTICAL MAN, SUGGESTED "A MOMENT OF REVERENT SILENCE AT OPENING OF CLASS" MIGHT ADEQUATELY "SERVE THE SCHOOL DEVOTIONAL ACTIVITIES WITHOUT JEOPARDIZING ANYONE'S RELIGIOUS LIBERTIES OR IMPINGING UPON THE PROPER DEGREE OF SEPARATION LETWEEN THE SPHERES OF RELIGION AND GOVERNMENT.[16]

IT MIGHT BE OF INTEREST TO NOTE THAT AS A RESULT OF A STATEWIDE SURVEY MADE BY A POLITICAL SCIENCE PROFESSOR AT WEST GEORGIA COLLEGE, HE CONCLUDED THAT THE UNCONSTITUTIONALITY OF STATE LAWS REQUIRING DAILY RELIGIOUS EXERCISES WAS IGNORED THROUGHOUT THE STATE. HE WROTE "A VERY LARGE PERCENTAGE OF SUPERINTENDENTS AND PRINCIPALS KNOW THE LAW AND ARE FLAGRANTLY, EVEN BOASTFULLY VIOLATING IT".[17]

THE NEW HAMPSHIRE LEGISLATURE IN 1967 REQUESTED AN ADVISORY OPINION OF THE JUSTICES OF ITS HIGHEST COURT REGARDING A PROPOSED STATE STATUTE. SUCH LAW WOULD HAVE REQUIRED THAT A PLAQUE BE DISPLAYED ON THE WALL OF EVERY CLASSROOM IN PUBLIC EDUCATIONAL INSTITUTIONS ON WHICH WOULD APPEAR THE WORDS "IN GOD WE TRUST". THE JUSTICES AGREED THAT SUCH LAW WOULD BE CONSTITUTIONALLY UNOBJECTIONABLE.[18] THEY NOTED THAT THERE ARE ACTIVITIES WHICH, ALTHOUGH RELIGIOUS IN ORIGIN, HAVE CEASED TO HAVE RELIGIOUS MEANING. THE USE OF THE MOTTO "IN GOD WE TRUST" ON CURRENCY, BUILDINGS, AND PUBLIC DOCUMENTS WOULD NOT OFFEND THE ESTABLISHMENT CLAUSE, HAD BECOME DEEPLY INTERWOVEN INTO THE FABRIC OF OUR CIVIL POLITY, AND DID NOT PRESENT THE TYPE OF INVOLVEMENT WHICH THE FIRST AMENDMENT PROHIBITS.

IN FLORIDA, A FIRST AMENDMENT COMPLAINT WAS LODGED AGAINST BOTH THE CREATION AND DISPLAY OF CHILDREN'S ART WORKS WHICH INCLUDED RELIGIOUS SYMBOLS. THE COURT RULED THAT CHILDREN COULD EXPRESS THEIR TALENTS THROUGH MEDIA INCLUDING RELIGIOUS THEMES; THAT THEIR EFFORTS COULD NOT BE EXCLUDED FROM DISPLAY AND RECOGNITION BECAUSE THEY CHOSE A RELIGIOUS SUBJECT; AND THAT TO EXCLUDE THE ART WORK WOULD MORE NEARLY HAVE APPROACHED A RESTRAINT UPON FREE EXERCISE OF RELIGION THAN DID THE PRACTICE OF PERMITTING SUCH DISPLAYS. THE BALANCE OF RIGHTS WAS IN FAVOR OF THE EXISTING PRACTICE.[19]

IN 1970 A LIFE-SIZED NATIVITY SCENE WAS SET UP IN A DISTRICT OF COLUMBIA NATIONAL PARK. AN ACTION WAS BROUGHT TO ENJOIN THE DISPLAY AS HAVING A VISUAL IMPACT SUBSTANTIALLY RELIGIOUS WHICH VIOLATED THE FIRST AMENDMENT. THE VISUAL DEMONSTRATION AS A WHOLE INCLUDED SUCH SECULAR SYMBOLS AS REINDEER, THE YULE LOG, AND THE CHRISTMAS TREE. AN OFFICIAL PAMPHLET HAD ANNOUNCED THE PURPOSE OF THE DISPLAY. SAID THE COURT: "THE CRECHE WAS INTENDED TO BE SIMPLY ONE OF A GROUP OF OBJECTS TO SHOW HOW THE AMERICAN PEOPLE CELEBRATE THE HOLIDAY SEASON SURROUNDING CHRISTMAS." THE HOLIDAY SEASON "HAS A CLEARLY SECULAR HALF." THE DISPLAY INCLUDED "DEFINITELY SECULAR SYMBOLS OF THE SECULAR HOLIDAY".[20] THE GOVERNMENT MAY DEPICT OBJECTS WITH SPIRITUAL CONTENT--FOR EXAMPLE, A POSTAGE STAMP BEARING A REPRODUCTION OF A RELIGIOUS PAINTING--BUT MAY NOT PROMOTE OR GIVE ITS STAMP OF APPROVAL TO SUCH SPIRITUAL CONTENT.

THE CIRCUIT COURT DISTINGUISHED ITS RULING FROM ONE MADE THE PREVIOUS YEAR BY THE OREGON SUPREME COURT.[21] THERE THE COURT RULED THAT THE CONSTRUCTION OF A PERMANENT CROSS ON PARK PROPERTY VIOLATED THE ESTABLISHMENT CLAUSE. IT HELD THAT THE SYMBOL MORE THAN REPRESENTED THE BELIEFS OF CERTAIN COMMUNITY MEMBERS. IT PROMOTED OR APPROVED THOSE BELIEFS. IT WAS NOT RELATED TO A SECULAR CELEBRATION. IT WAS NOT PUT INTO SECULAR PERSPECTIVE BY THE PRESENCE OF OTHER SYMBOLS. ITS SECULAR PURPOSE WAS NOT CONFIRMED BY ANY EXPLANATORY MATERIAL.

IN 1948, THE COURT INVALIDATED A RELEASED TIME PLAN OF RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS DURING REGULAR SCHOOL HOURS. THE MAJORITY ADJUDGED THIS AS AID TO SECTARIAN GROUPS. IT HELPED PROVIDE PUPILS FOR RELIGIOUS CLASSES THROUGH THE STATE COMPULSORY PUBLIC SCHOOL MACHINERY.[22]

FOUR YEARS LATER THE COURT UPHELD A RELEASED TIME PROGRAM BECAUSE IT WAS HELD OFF SCHOOL PREMISES. GOVERNMENT TIME AND FACILITIES WERE USED NEITHER TO AID NOR IMPAIR RELIGION. IN BRIEF, THE GOVERNMENT WAS ACCOMMODATING THE SPIRITUAL AND RELIGIOUS NATURE OF THE PEOPLE.[23]

BY WHAT PRINCIPLES DO WE ABIDE TODAY? BY WHAT WILL OUR DAY-TO-DAY DECISION BE COVERNED? CERTAIN PUBLIC WELFARE SERVICES SUCH AS FIRE AND POLICE PROTECTION, BUS TRANSPORTATION, TEXTBOOKS, ARE LEGITIMATE EXAMPLES OF GOVERNMENT INVOLVEMENT. THEY HAVE A SECULAR PURPOSE. PRAYER AND BIBLE VERSES ARE NOT AN APPROPRIATE PART OF SCHOOL EXERCISES. HOLIDAY ACTIVITIES ARE NOT VIOLATIVE OF THE CONSTITUTION AS LONG AS THEIR SECULAR PURPOSES ARE DOMINANT. SYMBOLS HAVING A RELIGIOUS CONNOTATION WOULD BEST BE AVOIDED. EDUCATIONAL DISCIPLINES SUCH AS LITERATURE, MUSIC, ART, AND HISTORY DO INCLUDE ELEMENTS OF RELIGIOUS ORIGIN OR EXPRESSION. INSTRUCTIONAL APPROACH AND IMPLEMENTATION REQUIRE STRICT NEUTRALITY BY THE TEACHER. SCHOOLS MAY ACCOMMODATE THE PEOPLE'S RELIGIOUS AND SPIRITUAL NATURE WHILE REMAINING EFFECTIVELY NEUTRAL.

RELIGION FOOTNOTES

1. Lemon v. Kurtzman, 403 U.S. 602 (1971)

2. Early v. Dicenso; Robinson v. Dicenso, both at p. 403 U.S. 602 (1971)

3. 403 U.S. 602, p. 610 (mathematics, modern foreign languages, physical science, physical education)

4. Dicenso v. Robinson and Earley (Intervenor), 316 F.Supp. 112 (1970)

5. 20 U.S.C. Sec. 701-758

6. Tilton v. Richardson, 403 U.S. 672 (1971): a library at Sacred Heart University; a music, drama, and arts building at Annhurst College; a science building and library at Fairfield University; a language laboratory at Albertus Magnus College

7. 312 F.Supp. 1191 (D.Conn. 1970)

8. Herbert, George, Jacula Prudentum, Home Book of Quotations, Dodd, Mead & Co., New York, 1967, p. 1081

9. 403 U.S. 672, 688

10. 403 U.S. 672, 693

11. Fenton, Jerome D. quoted in Herbert V. Prochnow, The Complete Toastmaster, Prentice-Hall, Inc., Englewood Cliffs, N.J., 1966, p. 162

12. Stein, Herbert quoted in Bennet Cerf, Laugh Day, Doubleday & Co., Inc., Garden City, N.Y., 1965, p. 281

13. De Spain v. De Kalb County Community School District, 384 F.2d 836 (1967)

14. Engel v. Vitale, 370 U.S. 421 (1962)

15. School District of Abington v. Schempp, 374 U.S. 203, 223

16. 30 A.L.R.3d 1352, 1354 (1970)

17. Mykkelvedt, Roald V., Georgia State Bar Journal, May 1973, p. 440

18. Opinion of the Justices 103 NH 97 (1967)

19. [illegible] vacated 374 U.S. 487 (1963); original opinion adhered to in 160 So. 2d 97, reversed as to other matters 377 U.S. 402

20. Allen v. Hickel, 424 F.2d 944 (1970)

21. Lower v. Eugene, 463 P.2d 360

22. Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 212 (1948)

23. Zorach v. Clauson, 343 U.S. 306, 315 (1952)

24. "The Gospel According To Joe Miller" quoted in S.A. Botkin, A Treasury of American Anecdotes, Random House, N.Y., 1957, p. 132